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# State v. Votroubek Appellant's Brief Dckt. 43104

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 43104
	)	
v.	)	ADA COUNTY NO. CR 2014-15761
	)	
TIMOTHY RAY VOTROUBEK,	)	
	)	
Defendant-Appellant.	)	APPELLANT'S BRIEF
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Timothy Votroubek pled guilty to a single count of DUI and a persistent violator enhancement. He received a sentence of ten years, with three years fixed. On appeal, Mr. Votroubek contends the district court abused its sentencing discretion by imposing a sentence which is excessive given any reasonable view of the facts.

Statement of the Facts and Course of Proceedings

By all outward appearances, Mr. Votroubek's upbringing was ideal. He grew up on a dairy farm, with both of his parents and three siblings in the home. (See PSI,

pp.12, 13, 14.)<sup>1</sup> As a child and teenager, Mr. Votroubek was in 4-H; he was involved in “Know Your Government”; he was class president twice; he was a multi-sport athlete; and he did well in school, even making the honor roll a few times on his way to graduating from high school and successfully completing a certified nursing assistant program at the College of Southern Idaho. (PSI, pp.13, 17.) He also played music with the family band. (PSI, p.14.) As Mr. Votroubek now explains it, “In public we were a perfect family.” (PSI, p.13.)

However, there was darkness lurking beneath the façade. Mr. Votroubek’s father, Terry Votroubek, was a damaged man who passed his troubles on to his son. Terry was the son of two alcoholic parents. (PSI, p.13.) Terry’s mother drank during her pregnancy with Terry and never quit until the day she died. (PSI, p.13.) Terry’s father was not only a drinker, but he beat Terry every chance that he got. (PSI, p.13.) Terry left home at only thirteen, and his parents could not have cared less. (See PSI, p.13.) Although Terry stayed away from alcohol because he did not want to end up like his parents, he emulated them in other respects; namely, he appears to have been addicted to prescription painkillers and was violent with his children just as his own father had been. (See PSI, p.13.) As Mr. Votroubek explained, his father “was a hard man” and his father’s word “was law.” (PSI, p.13.) Terry used his fists on his children; “everyone walked on egg shells because you never knew when he would [lose] his temper.” (PSI, pp.13, 15.) On the few occasions when Mr. Votroubek’s mother would

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<sup>1</sup> “PSI” refers to the 245-page electronic document, “Votroubek 43104 psi.” That electronic document includes, but is not limited to, the pre-sentence investigation report and all attachments thereto, an addendum to the PSI and five appended support letters, two different GAIN-I assessments, and a mental health evaluation report.

try to protect him from his father, she “ended up getting hurt.” (PSI, p.13.) Although Mr. Votroubek tried desperately to please his father, he could do nothing to gain his father’s approval—only more criticism. (PSI, p.13.)<sup>2</sup>

As a child, Mr. Votroubek also suffered at the hands of his older brother. As he explained, when he was young, his “oldest brother was always wanting to do sexual things to the rest of us kids . . . .” (PSI, p.13; *accord* PSI, p.15.) Unfortunately, he could not even turn to his own father for help because he was afraid of how his father would react. (PSI, p.13.) Even some of the “good” experiences in Mr. Votroubek’s childhood had negative effects on him. For example, although Mr. Votroubek loved playing music in the family band, they eventually started playing gigs in bars and clubs. (PSI, p.14.) Thus, Mr. Votroubek sometimes would not get home until 2:30 a.m., and had to grow up watching people get drunk. (PSI, p.14.) Obviously, this was terrible modeling for any child, but especially for a child with a line of addiction in his family. Mr. Votroubek has said that, “looking back on everything, the [trauma] from physical, sexual and emotional abuse I have been shattered.” (PSI, p.14.)

Mr. Votroubek has a long history of mental health and substance abuse problems. Early on, he was diagnosed with ADHD (attention deficit-hyperactivity disorder). (PSI, pp.13, 20, 170; *see a/so* Tr., p.27, Ls.11-13.) He was medicated (with Ritalin), and the medication helped, but looking back, Mr. Votroubek believes it “turn[ed] [his] addiction gene loose.” (PSI, pp.13, 14.) He also suffers from bipolar disorder, PTSD (post-traumatic stress disorder), and a mood disorder. (PSI, pp.19-20, 170;

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<sup>2</sup> Ultimately, in 2010, Terry Votroubek’s demons got the better of him, and he committed suicide by overdosing on painkillers. (PSI, pp.12, 14.) He left a “nasty” suicide note for Mr. Votroubek’s mother, apparently blaming her for his troubles. (See PSI, p.14.)

Tr., p.27, Ls.11-13.) For these, he has been prescribed Effexor (venlafaxine), lithium, and Neurontin (gabapentin).<sup>3</sup> (PSI, p.20; Tr., p.27, Ls.11-23.) Mr. Votroubek has previously attempted suicide (PSI, p.21), just like his father.

Mr. Votroubek also has a long history of drug and alcohol use (and abuse). He first consumed alcohol at age six, and he first used marijuana and inhalants at age twelve. (PSI, pp.21, 22.) In his teens, he began using certain hard drugs (methamphetamine and cocaine) regularly and experimenting with others (heroin and LSD). (PSI, pp.21-22.) Of all of these, alcohol appears to be Mr. Votroubek's biggest problem. He was drinking regularly by the age of 14-16, and he reports that "when he does drink he always drinks to intoxication and normally drinks alone." (PSI, p.22.) Thus, it should not be surprising that he has been diagnosed with alcohol dependence. (PSI, pp.25, 166, 178.)

Mr. Votroubek recognizes that he self-medicates with alcohol. He said, "I get lost in my thoughts and can't shut them off. The alcohol makes me feel normal and I find a peace that makes me feel safe." (PSI, p.14.) But, at the same time, he knows alcohol is not the answer. (PSI, p.14.) He "want[s] to be free from this burden" of mental illness and addiction, and he recognizes that "find[ing] balance in treatment and medication has always been the biggest battle" in his life. (PSI., p.14.) Mr. Votroubek knows that "alcohol has caused him problems with family, employment and with law enforcement," and that it can negatively impact his health. (PSI, p.23.) Thus, he told the pre-sentence investigator in this case that "he has a strong desire to stop using alcohol and felt he

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<sup>3</sup> Venlafaxine is an antidepressant. (See [www.drugs.com](http://www.drugs.com).) Lithium is used to treat the manic episodes of bipolar disorder. (See *id.*) And gabapentin is an anti-convulsant. (See *id.*)

would benefit from treatment . . . .” (PSI, p.23; *accord* PSI, p.24 (“I wish I could get treatment . . . .”), p.182 (GAIN-I assessment indicating a high motivation for treatment); see *also* PSI, p.171 (showing high motivation for treatment even before this case arose).)

Given this history, it should not be surprising that the present case arises out of Mr. Votroubek’s alcohol consumption.

This case has its roots in events occurring in the first half of 2014. Mr. Votroubek began 2014 in prison for a prior felony DUI conviction. (See PSI, pp.6, 11.) After completing the CAPP program, Mr. Votroubek was released on parole in February. (PSI, p.6.) It was at that time that things started coming together for Mr. Votroubek for the first time in his life. (See Tr., p.51, L.18 – p.52, L.2.) He was able to get into a fairly intensive outpatient treatment program with Ascent Behavioral Health, he was properly medicated, he was participating in one-on-one counseling, and he found temporary housing at Settler Group Home as he prepared to transition into a place of his own. (Tr., p.51, L.18 – p.52, L.2; PSI, p.6.)

The Settler Group Home was apparently run by another parolee, Bill Maismer. (See PSI, p.6.) Unfortunately, before too long, Mr. Maismer made sexual advances toward Mr. Votroubek, and even touched him inappropriately on one occasion. (PSI, p.6.) In late July, Mr. Votroubek got into a number of arguments because Mr. Maismer was mad that Mr. Votroubek had had reported these sexual advances to his parole officer. (PSI, p.6.) Following the second such argument, Mr. Votroubek was arrested and charged with battery. (PSI, p.6.) However, after sitting in jail for nearly sixty days, all charges were eventually dismissed. (PSI, pp.6, 9.) He was released from jail at the

end of September. (See PSI, p.5; see *a/so* PSI, p.9 (indicating the case was dismissed on September 18, 2014).)

After his release from county jail, Mr. Votroubek struggled to get back on track. It took too long to get back into treatment and counseling and to get his mental health medications straightened out, and Mr. Votroubek relapsed. (See Tr., p.52, Ls.2-23.) He also continued to have problems with Mr. Maismer. On October 25, 2014, when he went to pick up his vehicle, which had been parked at a friend's residence, Mr. Votroubek discovered it had two flat tires. (PSI, p.5.) He was told by his friend that Mr. Maismer had probably damaged the tires. (PSI, pp.5, 7.)

After dealing with his flat tires, Mr. Votroubek, who had already been drinking some that day, decided to drive to the liquor store. (PSI, p.5.) He purchased a pint of vodka and a mixer, poured them into an empty milk jug in his center console, and went to the Settler Group Home to see his dog (which had apparently been left there when Mr. Votroubek went to jail). (PSI, p.5.) When he got to the door, his dog, Alie, greeted him affectionately. (PSI, p.5.) But a man Mr. Votroubek had never met before (later identified as Justin Murdock) told him he could not be there because of a no-contact order prohibiting Mr. Votroubek's contact with Mr. Maismer, the proprietor of the home.<sup>4</sup> (PSI, p.5.) The man shoved Mr. Votroubek, and Mr. Votroubek shoved him back before leaving. (PSI, p.5.)

At that point, Mr. Votroubek was extremely frustrated. (PSI, pp.5, 7.) Besides having to spend time and money dealing with damaged tires and being denied access

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<sup>4</sup> It is not clear whether the no-contact order was still in place, given the dismissal of the charges related to the prior alleged battery of Mr. Maismer and, even if it was, whether it was properly still in place.

to his canine companion, Mr. Votroubek had no funding for treatment, housing, or his medications. (PSI, pp.5, 7.) Additionally, although he was able to find good job opportunities, he was ultimately denied employment because he did not have a valid driver's license. (PSI, p.5.) Feeling despondent, Mr. Votroubek drove around for a while before heading to Mr. Maismer's residence to scare him. (PSI, p.7.) Once there, he waited in his vehicle, drank his vodka drink, and spoke to one of Mr. Maismer's neighbors. (PSI, p.7.) Before too long, officers arrived, found Mr. Votroubek quite intoxicated, and arrested him. (See PSI, pp.3-4, 7.) Breath tests indicated alcohol concentrations of .283 and .279. (PSI, p.4.)

Mr. Votroubek was charged with felony DUI (which was elevated to a felony for having a prior felony DUI within the last 15 years), a persistent violator enhancement, and a number of misdemeanors (violation of a no-contact order, battery, unlawful entry, and driving without privileges). (See R., pp.47-50, 54-55.) Thereafter, he pled guilty pursuant to a plea agreement with the State. Under the terms of the agreement, Mr. Votroubek agreed to plead guilty to felony DUI and the persistent violator enhancement and to participate in all ordered evaluations; in exchange, the State agreed to dismiss the misdemeanors and, on the felony, recommend a sentence of no more than fifteen years, with six years fixed. (Tr., p.20, L.12 – p.22, L.12; R., p.68.) The district court ultimately imposed a sentence of ten years, with three years fixed. (R., p.75; Tr., p.58, Ls.9-10.)

Thereafter, Mr. Votroubek filed a timely motion seeking a reduction of his sentence pursuant to Idaho Criminal Rule 35 and a supporting memorandum. (Motion for Reconsideration of Sentence (Jun. 15, 2015); Brief in Support of Defendant's Motion



for Reconsideration of Sentence (Jun. 15, 2015)).<sup>5</sup> The State objected to Mr. Votroubek's motion (see State's Objection to Defendant's Motion for Reconsideration of Sentence (Jun. 29, 2015)), and the district court denied that motion without a hearing (see Order Denying Motion for Reconsideration Under ICR 35 (Sept. 10, 2015)).

In the meantime, Mr. Votroubek had filed a notice of appeal timely from the district court's judgment of conviction. (See R., pp.74-76 (April 2, 2015 judgment of conviction), pp.79-81 (April 8, 2015 notice of appeal).) On appeal, Mr. Votroubek argues that his ten year sentence is excessive given any reasonable view of the facts and, therefore, represents an abuse of the district court's sentencing discretion.<sup>6</sup>

### ISSUE

Did the district court abuse its sentencing discretion by imposing upon Mr. Votroubek a sentence that is excessive given any reasonable view of the facts?

### ARGUMENT

#### The District Court Abused Its Sentencing Discretion By Imposing Upon Mr. Votroubek A Sentence That Is Excessive Given Any Reasonable View Of The Facts

As described in detail above, although Mr. Votroubek's childhood would have appeared very happy and healthy to an outsider, the fact is that the Votroubek home was far from a nurturing environment. Mr. Votroubek's father was a troubled, damaged soul who brought depression, addiction, and abuse into the family home. Additionally, Mr. Votroubek was sexually abused by his older brother.

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<sup>5</sup> The filings associated with Mr. Votroubek's Rule 35 motion are attached to a motion to augment the appellate record, which is filed concurrently herewith.

Whether a product of his home life, genes passed down through his father's side of the family, or both, Mr. Votroubek has exhibited problems of his own. As noted, as a youngster he was diagnosed with ADHD and, later, he was diagnosed with PTSD, bipolar disorder, a mood disorder, and alcohol dependence. In fact, Mr. Votroubek's alcoholism has become his biggest challenge in his life. To his credit though, Mr. Votroubek recognizes that he uses alcohol to self-medicate, he understands what his drinking has cost him, and he is ready to change; he is ready to stay sober.

During the pre-sentence investigation, Mr. Votroubek showed a great deal of maturity in accounting for his mental health problems, and for taking responsibility for his alcohol addiction and the antisocial choices he has made while under the influence of alcohol:

I am apologetic to the community and those I have hurt and offended. I am ashamed . . . . I wish I could get treatment and find a healthy environment to live in to succeed. . . . My choices have been self-made and selfish[.] If I could take back all the pain I have caused my loved ones I would. They have shown me true love because they never give up on hope.

(PSI, p.24.) During his allocution, Mr. Votroubek expanded upon his earlier comments in this regard:

As I stand here today feeling these reoccurring events that continue to happen in my life when I am sad, how many years wasted in grief I have brought my loved ones, community, and self?

I have a disease that is called alcoholism.

. . . .

I am responsible for the choices to get behind the wheel of a vehicle. I wish I could take that day back.

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<sup>6</sup> Mr. Votroubek is not challenging on appeal the district court's denial of his Rule 35 motion.

. . . .

I'm the one that made a choice to drink and drive, and no one forced me to do so. I want to be accountable for my actions and take ownership for why I stand in front of you today.

I want to learn what healthy, sober treatment can do for me so I can build a strong foundation. I want to learn about my addiction while incarcerated so that I can be successful with my sobriety when released.

(Tr., p.50, L.10 – p.54, L.12.)

So, although Mr. Votroubek has had relapses, it appears he is moving forward in his recovery because he accepts he has a problem and he sincerely wants to change. And, to this end, it is notable that he has significant family support. His mother, Sue Votroubek, still has a strong relationship with him and is there for emotional support. (See PSI, pp.12, 60.) Additionally, Mr. Votroubek's long-term girlfriend, Jennifer Montague, is willing and able to support him. (See PSI, pp.16, 57-59.) And, in doing so, she would have the help of her parents. (See PSI, p.56.) Thus, now may be Mr. Votroubek's best opportunity to finally beat his addiction and become a safe, productive member of society. To continue holding him in prison for at least three years, and possibly up to ten years, at this point may jeopardize a golden opportunity for rehabilitation and, therefore, it may make society less safe in the long run.

In light of all of this mitigating evidence, Mr. Votroubek submits that the district court imposed an excessive sentence.

### CONCLUSION

For the reasons set forth above, Mr. Votroubek respectfully requests that this Court find his sentence to be excessive, and that it either reduce his sentence or remand his case to the district court for a new sentencing hearing.

DATED this 24<sup>th</sup> day of November, 2015.

\_\_\_\_\_/s/\_\_\_\_\_  
ERIK R. LEHTINEN  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24<sup>th</sup> day of November, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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DEBORAH A BAIL  
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\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

ERL/eas